

FEC itself. Indeed, it is the standard practice of the Department to defer to the FEC in interpreting its regulations.

There is particular reason to defer to the expertise of the FEC in this matter, because the issue is not as clear-cut as you suggest. In *FEC v. Colorado Republican Federal Campaign Comm.*, 839 F. Supp. 1448 (D. Colo. 1993), *rev'd on other grounds*, 59 F.3d 1015 (10th Cir. 1995), *vacated*, 116 S.Ct. 2309 (1996), the United States District Court held that the following advertisement, run in Colorado by the state Republican Federal Campaign Committee, did not constitute "express advocacy":

"Here in Colorado we're used to politicians who let you know where they stand, and I though we could count on Tim Wirth to do the same. But the last few weeks have been a real eye-opener. I just saw some ads where Tim Wirth said he's for a strong defense and a balanced budget. But according to his record, Tim Wirth voted against every new weapon system in the last five years. And he voted against the balanced budget amendment."

"Tim Wirth has a right to run for the Senate, but he doesn't have a right to change the facts."

839 F. Supp. at 1451, 1455-56. The court held that the "express advocacy" test requires that an advertisement "in express terms advocate the election or defeat of a candidate." *Id.* at 1456. The Court of Appeals reversed the District Court on other grounds, holding that "express advocacy" was not the appropriate test, and the Supreme Court did not reach the issue.

Furthermore, a pending matter before the Supreme Court may assist in the legal resolution of some of these issues; the Solicitor General has recently filed a petition for certiorari on behalf of the FEC in the case of *Federal Election Commission v. Maine Right to Life Committee, Inc.*, No. 96-1818, filed May 15, 1997. I have enclosed a copy of the petition for your information. It discusses at some length the current state of the law with respect to the definition and application of the "express advocacy" standard in the course of petitioning the Court to review the restrictive definition of the standard adopted by the lower courts in that case.

It appears, therefore, that the proper legal status of these advertisements under the regulations issued by the FEC is a question that is most appropriate for initial review by the FEC.

Accordingly, I have referred your letter to the FEC for its consideration. Thank you for your inquiry on this important matter, and do not hesitate to contact me if I can be of any further assistance.

Sincerely,

JANET RENO.

OFFICE OF THE ASSISTANT ATTORNEY
GENERAL, U.S. DEPARTMENT OF
JUSTICE,

Washington, DC, June 19, 1997.

Hon. JOHN WARREN MCGARRY,
Chairman, Federal Election Commission, Wash-
ington, DC.

DEAR MR. CHAIRMAN: Enclosed for the attention and whatever further reply the Federal Election Commission (FEC) finds to be appropriate is a copy of an exchange of correspondence between the Attorney General and Senator Arlen Specter of Pennsylvania concerning the application of the Commission's rules governing issue advocacy by political parties to a specific advertisement. The Department of Justice regards the subject matter of this inquiry as properly within the primary jurisdiction of the FEC.

If we can assist the Commission in any way in this matter, please let me know.

Sincerely,

MARK M. RICHARD,
Acting Assistant Attorney General.

FEDERAL ELECTION COMMISSION,
Washington, DC, June 26, 1997.

Hon. ARLEN SPECTER,
U.S. Senate, Washington, DC.

DEAR SENATOR SPECTER: Your letter of May 1, 1997 to Attorney General Reno has been referred by the Department of Justice to the Federal Election Commission. Your letter asks for a legal opinion on whether the text of certain advertisements constitutes "issue advocacy" or "express advocacy".

As the Attorney General's June 19, 1997 letter to you correctly notes, the Federal Election Commission has statutory authority to "administer, seek to obtain compliance with, and formulate policy with respect to" the Federal Election Campaign Act ("FECA"). 2 U.S.C. §437c(b)(1). The Commission's policymaking authority includes the power to issue rules and advisory opinions interpreting the FECA and Commission regulations. 2 U.S.C. §§437f and 438.

Your May 1 letter notes that the Commission has promulgated a regulatory definition of "express advocacy" at 11 CFR 100.22. While the Commission may issue advisory opinions interpreting the application of that provision, the FECA places certain limitations on the scope of the Commission's advisory opinion authority. Specifically, the FEC may render an opinion only with respect to a specific transaction or activity which the requesting person plans to undertake in the future. See 2 U.S.C. §437f(a) and 11 CFR 112.1(b). Thus, the opinion which you seek regarding the text of certain advertisements does not qualify for advisory opinion treatment, since the ads appears to be ones previously aired and do not appear to be communications that you intend to air in the future. Moreover, "[n]o opinion of an advisory nature may be issued by the Commission or any of its employees except in accordance with the provisions of [section 437f]." 2 U.S.C. §437f(b).

While the FECA's confidentiality provision precludes the Commission from making public any information relating to a pending enforcement matter, I note that past activity such as the advertisements you describe may be the subject of compliance action. If you believe that the advertisements in question involve a violation of the FECA, you may file a complaint with the Commission pursuant to 2 U.S.C. §437g(a) noting who paid for the ads and any additional information in your possession that would assist the Commission's inquiry. The requirements for filing a complaint are more fully described in the enclosed brochure.

I hope that this information proves helpful to your inquiry. Please feel free to contact my office or the Office of General Counsel if you need further assistance.

Sincerely,

JOHN WARREN MCGARRY,
Chairman.

Mr. SPECTER. Mr. President, that concludes my remarks and I see staff bringing me the concluding papers, which I shall present.

ORDERS FOR THURSDAY, SEPTEMBER 3, 1998

Mr. SPECTER. Mr. President, on behalf of our distinguished majority leader, I ask unanimous consent that when the Senate completes its business today, it stand in recess until 9:30 a.m. on Thursday, September 3. I further ask that when the Senate reconvenes on Thursday, immediately following the prayer, there be a period for the transaction of morning business until

11:30 a.m., and further that the time between 9:30 and 10:30 be divided as follows: Senator BREAUX for 15 minutes, Senator TORRICELLI for 15 minutes, Senator DASCHLE or his designee for 30 minutes. I further ask that the time between 10:30 and 11:30 a.m. be under the control of Senator THOMAS or his designee.

The PRESIDING OFFICER. Without objection, it is so ordered.

PROGRAM

Mr. SPECTER. For the information of all Senators, when the Senate reconvenes on Thursday at 9:30 a.m., there will be a period of morning business until 11:30 a.m. Following morning business, the Senate may turn to consideration of any available appropriations bills or other legislation or executive items cleared for action.

EXECUTIVE SESSION

DEPARTMENT OF STATE

Mr. SPECTER. Mr. President, on behalf of the majority leader, I ask unanimous consent that the Senate go into executive session and that the Foreign Relations Committee be discharged from further consideration of the following nominations, and the Senate then proceed to their consideration: Senator ROD GRAMS, Senator JOSEPH BIDEN, former Senator Claiborne Pell.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. SPECTER. I ask unanimous consent that the nominations be confirmed en bloc, the motions to reconsider be laid upon the table, the President be notified of the Senate's action, and the Senate return to legislative session.

The PRESIDING OFFICER. Without objection, it is so ordered.

The nominations considered and confirmed, en bloc, are as follows:

DEPARTMENT OF STATE

Rod Grams, of Minnesota, to be a Representative of the United States of America to the Fifty-third Session of the General Assembly of the United Nations.

Joseph R. Biden, of Delaware, to be a Representative of the United States of America to the Fifty-third Session of the General Assembly of the United Nations.

Claiborne deB. Pell, of Rhode Island, to be an Alternate Representative of the United States of America to the Fifty-third Session of the General Assembly of the United Nations.

LEGISLATIVE SESSION

The PRESIDING OFFICER. Under the previous order, the Senate will now return to legislative session.

RECESS UNTIL 9:30 A.M. TOMORROW

Mr. SPECTER. Mr. President, on behalf of the majority leader, if there is